No. 92-593

Supreme Court, U.S.
FILED
JUL 7 1993
OFFICE OF THE CLERK

In The Supreme Court Of The United States

MIGUEL DE GRANDY, et al.

Appellants,

v.

BOLLEY JOHNSON, et al.

Appellees.

On Appeal From The United States District Court For The Northern District Of Florida Tallahassee Division

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REPLY BRIEF

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REPLY BRIEF

ARGUMENT

The fundamental issue presented by the De Grandy Appellants (and by the United States) in its appeal concerns the nature and extent of a district court's duty to remedy completely an established violation of Section 2 of the Voting Rights Act. The brief of the Florida Senate fails to address directly the substance of this issue and, instead, insists that its purported defense of proportionality precludes liability.

The district court erred, first, by failing to provide a remedy hearing for the violations it found and, then, by

imposing the illegal plan both for the 1992 elections and for post-1992 elections. The district court should not have taken that serious and final action without first conducting a complete and orderly proceeding to determine whether other options -- including the plan offered by the Appellants -- would remedy the violation.[1] The lower court's conclusory statement that "the Florida Senate Reapportionment plan is the fairest to all ethnic communities in Dade County" cannot be reconciled with its finding of a violation of Section 2 and should not be sustained in light of the court's failure to examine other alternatives. Accordingly, the district court's judgment adopting the state's plan should be vacated and the case should be remanded for further remedial proceedings.[2]

[1] See Affidavit of Rockie Pennington, Appellants' Jurisdictional Statement App. 110. Neither the district court's opinion nor the State's brief addresses the Appellants' contention that Mr. Pennington's plan, offered at the conclusion of the liability phase, demonstrated the ability to draw a practical, effective districting plan with four Hispanic and three African-American majority districts without violating the rights of any protected class in south Florida and without running afoul of this Court's recent condemnation of any district that is, "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race." Shaw v. Reno, No. 92-357, 1993 WL 224459 at *14 (U.S. June 28, 1993).

[2] The necessity of formulating a remedy which "completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice" (citing S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News at 208) is underscored by this Court's recent decision in Campbell v. Theodore, No. 92-219, 1992 WL 194585 (U.S. June 14, 1993).

Under the facts of this case, the allegedly proportional allocation of Senate seats in the state's Senate districting plan provides no per se affirmative defense to a Section 2 claim, for four reasons:

1. The plain language of Section 2 and its legislative history fail to support the application of a per se proportionality defense.

The language of the proportionality "disclaimer" contained in amended Section 2 provides, in part, as follows: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973. There is no dispute that this language precludes Section 2 plaintiffs from basing a liability claim upon a mere showing that a minority group has failed to achieve proportional representation.

The disclaimer requires plaintiffs to show more than the absence of proportional representation. In addition, it neither explicitly nor implicitly creates a defense to liability, nor does it establish the per se defense raised by the Appellees. In addition to the clear language of the proviso, the lengthy and authoritative legislative history accompanying the 1982 amendments discloses that Congress intended only to emphasize that minorities have no right to claim a proportional remedy, not to define a defense:

> This disclaimer is entirely consistent with . . . Supreme Court and Court of Appeals precedents, which contain similar statements regarding the absence of any right to proportional representation. It puts

to rest any concerns that have been voiced about racial quotas.

The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated provides adequate assurance, without disturbing the prior case law or prescribing in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances. The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and elect candidates of their choice.

S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News.

The disclaimer portion of Section 2 was contained in an amendment offered by Senator Dole who explained the purpose of this language:

> The language of the subsection explicitly rejects, as did White [v. Regester, 412 U.S. 755 (1973)] and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, and is not dispositive.

1982 U.S. Code Cong. & Admin. News at 364. It is manifestly clear from the unambiguous legislative language and history that the true purpose behind the disclaimer was to clarify that minority groups could not assert a right to proportional representation. Any actual (or projected) minority electoral successes should be considered by a district court as "just one factor" in evaluating the totality of circumstances in a given case. As recently noted by Justice White in his dissenting opinion in Shaw v. Reno, No. 92-357, 1993 WL 224459 at *22, n.6 (U.S. June 28, 1993):[3]

> This is not to say that a group that has been afforded roughly proportional representation never can make out a claim of unconstitutional discrimination. Such districting might have both the intent and effect of "packing" members of the group so as to deprive them of any influence in other districts. Again, however, the equal protection inquiry should look at the group's overall influence over, and treatment by, elected representatives and the political process as a whole.

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[3] In this passage, Justice White is citing established law, which was not affected by the majority's views in that case. See Thornburg v. Gingles, 478 U.S. 30, 74-77 (1986); Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 359 (7th Cir. 1992).

2. Section 2 may be violated even in the presence of proportional representation.

Even assuming the availability and proper proof of an affirmative defense of proportionality, a Section 2 violation may still be found. The Appellees' simplistic assertion that proportionality "must inevitably trump" the Gingles preconditions (Appellants' Brief 22) reveals a fundamental misunderstanding of the function and interpretation of the Voting Rights Act.

This Court has previously addressed the possibility that persistent proportional representation may not defeat a Section 2 claim. As Justice Brennan specifically warned in Gingles, "[i]n some situations, it may be possible for Section 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives. . . ." 487 U.S. at 77. In the instant case, not only was there no history of "sustained success" by Hispanics, but also there was unrebutted proof that the Hispanic minority's undiluted voting strength exceeded that provided for it by the state plan.

The essence of Justice Brennan's reasoning has been forcefully restated by the Seventh Circuit in Baird v. Consolidated City of Indianapolis, 976 F.2d 357 (7th Cir. 1992).

> We agree . . . that proportional representation does not automatically defeat claims under the Voting Rights Act -- not only because Justice Brennan's opinion says so, 478 U.S. at 74-76 . . . , but also because the statute gives to each person the right to political participation. . . . A balanced

> bottom line does not foreclose proof of discrimination along the way. . . . Just as the proviso . . . ensures that white candidates are free to compete for electoral success that exceeds the ratio of white voters, so blacks must be free to compete for favor; the Voting Rights Act neither sets nor tolerates a cap on their achievements.

Id. at 359 (emphasis added and citation omitted).

3. The Appellees failed to establish that the state's reapportionment plan provides for proportional representation in the State of Florida.

Even if proportional representation might provide a defense in some cases, the Appellees failed to establish such a defense in this case. The Appellees assert that they offered their proportionality defense at trial, and that the lower court "ignored this proportionality argument. . . ." Appellees' Brief 14. This contention is erroneous. In fact, in light of other evidence satisfying the liability preconditions of Thornburg v. Gingles, 478 U.S. 30 (1986), the district court's finding of liability, with its implicit rejection of the proportionality defense, actually demonstrates that Appellees failed to meet their burden of proof with respect to any proportionality defense.

The lower court relied not only upon findings regarding the Gingles preconditions, but also upon other determinative factual considerations. As a result of evidence adduced at the congressional portion of the trial, the lower court panel found, inter alia:

> A longstanding general history of official discrimination against minorities has influenced Florida's electoral process. . . . [R]acially polarized voting exists throughout Florida to varying degrees. The results of Florida's legislative elections over the past ten years established the presence of racially polarized voting. . . .
>
> In the state of Florida, minorities have had very little success in being elected to either the United States Congress or the Florida Legislature . . . .

De Grandy v. Wetherell, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992).

These findings were adopted by the district court during the legislative trial and should not be disturbed on appeal.[4] Several of this Court's precedents have treated the ultimate finding of vote dilution as a question of fact subject to the clearly erroneous standard of Fed. R. Civ. P. 52(a). See, e.g., Rogers v. Lodge, 458 U.S. 613, 622-627 (1982); City of Rome v. United States, 446 U.S. 156, 183 (1980); White v. Regester, 412 U.S. 755, 765-770 (1973). Accordingly, the lower court's findings of vote dilution in South Florida overcome any asserted proportionality defense.

The Appellees' reliance on Nash v. Blunt, 797 F. Supp. 1488 (W.D. Mo. 1992), aff'd sub nom. African-American Voting Rights Legal Defense Fund, Inc. v. Blunt, 61 U.S.L.W. 3682 (April 5, 1993), to support their

[4] No appeal was taken from the district court's judgment implementing congressional districting, which includes these findings.

proportionality defense is misplaced. That case arose in a factual setting clearly distinguishable from the present case. Unlike the historical experience in Florida, the Nash court found evidence of a history of proportional representation, as well as a near certain likelihood that there would be such representation in the future. In this case, the De Grandy Appellants and the United States both challenged a statewide reapportionment plan that contained only three (out of 40) Senate seats with an Hispanic majority, or 7.5 percent. Because Hispanics in Florida comprise 11.73 percent of the statewide voting age population, under a truly proportional system, they would be entitled to control 4.7 seats. Thus, the challenged plan contains only 65% of the seats that true proportionality would provide.[5] For this reason, the Appellees cannot claim to have achieved proportional representation for Hispanics in the state Senate plan.

4. The state as a whole is the correct geographic area in which a court should evaluate a claimed defense of proportionality.

Following this Court's recent unanimous opinions in Voinovich v. Quilter, ___ U.S. ___, 113 S. Ct. 1149, 1157 (1993) and Growe v. Emison, ___ U.S. ___, 113 S. Ct. 1075, 1084 (1993), there is no longer any doubt that the Gingles preconditions apply in cases challenging single-member districts as well as multimember districts. See also Shaw v. Reno, No. 92-357, 1993 WL 224459 (U.S. June 28, 1993). While the analytical framework for establishing liability is the same for each type of case, there remains a distinction in the manner in which plaintiffs must

[5] The Appellants' plan (see n. 1 supra), with its four Hispanic seats, achieves 85% of true proportionality.

bring a claim, and a corresponding distinction in considering evidence of claimed proportionality.

With regard to a multimember districting system, Section 2 plaintiffs must challenge specific districts which they allege submerge minorities who, otherwise, could form a majority in one or more single-member districts. This was the approach of the plaintiffs in Gingles at the district court level, and as approved by this Court. See Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), and 478 U.S. 30 (1986). Application of the three preconditions identifies whether a violation exists with regard to a given multimember district. In analyzing liability, one of the considerations is whether the challenged multimember district has a history of "persistent proportional representation." Such a history may be a sufficient basis for finding that there is no Section 2 violation, as in the case of District 23 in Gingles. 478 U.S. 30, 77. On the other hand, as Justice Brennan noted in Gingles, even in the multimember district context, proportional representation may not foreclose a Section 2 challenge. As Senator Dole said, it is "just one factor" to be considered in the totality of the circumstances. S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 364.

In a challenge to a single-member system, however, Section 2 plaintiffs face difficulties in proving that any particular district violates the Act. Such plaintiffs -- like the plaintiffs in the court below here -- must show that the system as a whole has been drawn in such a manner as to deprive minorities of an equal opportunity to participate in the electoral process.

Given equally populated districts, it could never be the case that, within a single-member district, a minority

group would be "sufficiently large" to form a majority in that single-member district. For the same reason, there cannot be any meaningful analysis of whether proportional representation has been achieved within single-member districts. As a result, the proportionality analysis -- again, "just one factor" in the totality of the circumstances -- is conducted with regard to the geographic area served by the political body in question, here statewide. This conclusion is entirely consistent with the fact that the challenged unit in a multimember district system -- the specific multimember district -- may be examined to determine whether sustained proportional representation from that district, along with the other factors in the totality of the circumstances, negate a finding that the plaintiffs have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 478 U.S. 30, 75 citing 42 U.S.C. § 1973(b).

Unless a minority group is entirely concentrated in one area of a state (which would be rare in any case, and certainly not true of Hispanics in Florida), the geographical compactness requirement of the three-pronged Gingles test will almost necessarily ensure that a plaintiff group will fail to achieve proportionality statewide. On the other hand, the fact that there will always be some significant non-minority population even in geographically compact majority/minority districts would doom that minority to perpetual underrepresentation statewide if proportionality were analyzed only in the area in which the minority was concentrated. For example, if (as in Florida) approximately 81% of the Hispanics are concentrated in Dade County but the remainder are so dispersed as to make the creation of Hispanic majority districts impossible elsewhere, the Appellees' reasoning would allow the Dade County area Hispanics to be packed into very highly concentrated

Hispanic districts (say 80%). Because there would still be 20% Anglo residents in those packed districts, however, a proportionality analysis which was confined to those districts would always "prove" that Hispanics were over-represented proportionally. Yet, such packing would be a clear violation of Section 2. And it is precisely such packing (although not to that degree) that caused the District Court to find liability with regard to the Senate plan in this case. The error was the court's failure to remedy it.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed and the case remanded to require a proper remedial hearing.

Respectfully submitted,

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